



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 7, 1992

Ms. Sedora Jefferson
General Counsel
Department of Commerce
P. O. Box 12728
Austin, Texas 78711

OR92-7

Dear Ms. Jefferson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 14444.

The Department of Commerce received from one of its employees an open records request, addressed to the department's former ombudsman, for "all of your written notes, observations and/or correspondence, including, but not limited to, any interviews or discussions" with specified employees concerning the requestor's complaint about not receiving travel reimbursement for a trip to San Francisco, California. You have submitted as responsive to the request a memorandum dated July 3, 1991, from the ombudsman to the department's interim executive director concerning the employee's request for and subsequent denial of reimbursement and an Office of Ombudsman "action form." You contend these two documents come under the protection of sections 3(a)(2) and 3(a)(11) of the Open Records Act.

A prior determination of this office, Attorney General Opinion JM-36 (1983) (copy enclosed), resolves your section 3(a)(2) claim. Section 3(a)(2) is designed to protect public employees' personal privacy. The scope of section 3(a)(2) protection, however, is very narrow. *Id.*; see also Open Records Decision No. 336 (1982). The test for section 3(a)(2) protection is the same as that for information protected by

common-law privacy under section 3(a)(1): to be protected from required disclosure, the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App. - Austin, 1983, writ ref'd n.r.e.). The information at issue pertains solely to departmental employees' actions as public servants and as such cannot be deemed to be outside the realm of public interest. Section 3(a)(2) was not intended to protect the type of information at issue here.

Section 3(a)(11) of the act protects from required public disclosure advice, opinion, or recommendation intended for use in the deliberative process. Open Records Decision No. 538 (1990). In Open Records Decision No. 429 (1985) at 5, this office indicated that information protected by section 3(a)(11) must be prepared by a person or entity with an official reason or duty to provide the information in question. *See also* Open Records Decision Nos. 283, 273 (1981). This helps assure that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 3(a)(11). Open Records Decision No. 464 (1987). In this regard, section 3(a)(11) protects solicited opinions of departmental employees who were interviewed during the ombudsman's investigation. *Cf.* Open Records Decision No. 466 (1987).

Section 3(a)(11) does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 450 (1986). If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982). We have marked those portions of the inter-office memoranda dated July 3, 1991, that you may withhold pursuant to section 3(a)(11). On the other hand, none of the information contained in the ombudsman's action form consists of advice, opinion, or recommendation; this form must therefore be released in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with

a published open records decision. If you have questions about this ruling, please refer to OR92-7.

Yours very truly,

A handwritten signature in cursive script that reads "Susan Garrison".

Susan Garrison
Assistant Attorney General
Opinion Committee

SG/RWP/lcd

Ref.: ID# 14444

Enclosures: Attorney General Opinion JM-36
Marked documents

cc: Ms. Suzanne Hubble
Department of Commerce
P. O. Box 12728
Austin, Texas 78711
(w/o enclosures)